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# Sales -- Breach of Warranty -- Allergies

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taxation grounds and buildings of charitable hospitals used solely for their appropriate objects, and not leased or otherwise used with a view to profit. Thus a lease to a private practitioner, engaged in practice for a profit, presents the problem of a possible loss of tax exemption.

- (3) Under the Hill-Burton Act, which provides for federal grant in aid to hospitals, a hospital must be entirely non-profit to qualify, and some fear that a lease of facilities to a profit-making group may make the leasing hospital ineligible.

In view of the long standing and almost universal practice of operation by hospitals of these facilities, and the tremendous degree of public interest involved,<sup>43</sup> it is to be hoped that whatever the outcome, the decision will be fashioned from the court's consideration of whether the arrangement in controversy offends either the purposes of the medical practice acts or is attended by any of the common public policy objections to the corporate practice of medicine.

It is hoped that the Iowa court will reconsider the broad maxim condemning all corporations alike. While it undoubtedly served satisfactorily in the past when it was invoked against anti-social activities exclusively, it becomes oppressive when applied to corporations operated for the public benefit.

JACK T. HAMILTON.

### Sales—Breach of Warranty—Allergies

A condition diagnosed as weeping dermatitis appeared on plaintiff's scalp and neck after she had used defendant's hair rinse.<sup>1</sup> She sued for breach of warranty of fitness for the purpose intended. There was no evidence of deleterious or poisonous substances in the product. The evidence introduced was that plaintiff applied the rinse to her hair; that as a result she contracted dermatitis, and that a friend had a similar experience with the same rinse. The court refused recovery, indicated that her injury might have been caused by an allergy, and added: "... in an action by the buyer of a product against the seller for breach of warranty to recover damages for injuries resulting from the use of the product, there is no liability upon the seller, where the buyer was allergic or unusually susceptible to injury from the product, which fact was wholly unknown to the seller and peculiar to the buyer."<sup>2</sup>

<sup>43</sup> Of especial interest to the public is the effect upon the various Blue Cross plans of hospital insurance, which now insure and pay for laboratory and X-ray services furnished by hospitals, since it is a part of the hospital bill. Some fear this plan may be impaired and disrupted if the charges are made by the doctor.

<sup>1</sup> *Hanrahan v. Walgreen Co.*, 243 N. C. 268, 90 S. E. 2d 392 (1955).

<sup>2</sup> *Id.* at 269.

North Carolina has not been wholly consistent in determining whether there is an implied warranty of fitness for the purpose intended in the sale of goods. Earlier cases held that there was no warranty and applied the rule of *caveat emptor*,<sup>3</sup> but the trend in recent cases has been toward holding there is such a warranty. In only two cases did the court indicate there must be reliance on the seller's skill and judgment.<sup>4</sup> Other cases do not raise such a condition.<sup>5</sup> These latter cases are inconsistent with the weight of authority in other states in that the majority of courts recognize an implied warranty if the goods are sold for a particular purpose, but only if the buyer relies on the seller's skill and judgment.<sup>6</sup> The *Uniform Sales Act* also provides that if the article is sold for a particular purpose and the buyer relies on the seller's skill and judgment, there is an implied warranty of fitness.<sup>7</sup> Often the particular purpose is commensurate with the general purpose, in which case the buyer will not be required literally to communicate the particular purpose to the seller.<sup>8</sup>

In the light of the foregoing it is seen that North Carolina is liberal in extending the implied warranty. Actions against seller for injuries to the buyer can also be grounded on negligence<sup>9</sup> or false representation.<sup>10</sup>

The implication of the principal case is that a buyer can never re-

<sup>3</sup> Dickson v. Jordan, 33 N. C. (11 Ired.) 166, 53 Am. Dec. 403 (1850); Woolbridge v. Brown, 149 N. C. 299, 62 S. E. 1076 (1908).

<sup>4</sup> Stokes v. Edwards, 230 N. C. 306, 52 S. E. 2d 797 (1949); Poovey v. International Sugar Feed No. 2 Co., 191 N. C. 722, 133 S. E. 12 (1926).

<sup>5</sup> See Note, 32 N. C. L. REV. 351 (1949) for an excellent discussion of the development of implied warranties in North Carolina.

<sup>6</sup> 46 AM. JUR., *Sales* §§ 346, 348 (1943); 77 C. J. S., *Sales* §§ 315(b), 325(b) (1952); 1 WILLISTON, *SALES* §§ 206, 235 (Rev. ed. 1948).

<sup>7</sup> UNIFORM SALES ACT § 15 (1). The *Uniform Sales Act*, which has been adopted in 37 States, but not in North Carolina, also includes one unfortunate provision which has caused buyers and courts much consternation. It provides that if the article is sold under a "patent or other trade name" there is no implied warranty. This phrase would deny the warranty even though there was reliance by the buyer on the seller's skill and judgment. Comment, 57 YALE L. J. 1389, 1393-1395 (1948); UNIFORM SALES ACT § 15 (4). The *Uniform Revised Sales Act* has omitted this provision. UNIFORM REVISED SALES ACT § 39.

<sup>8</sup> Clover Cutting Die Co. v. Sam Smith Shoe Corp., 96 N. H. 491, 79 A. 2d 8 (1951); Libke v. Craig, 35 Wash. 2d 870, 216 P. 2d 189 (1950); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942).

<sup>9</sup> Bennett v. Pilot Products Co., 120 Utah 474, 235 P. 2d 525 (1951); Annot., 26 A. L. R. 2d 958, 973 (1951); Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689 (1949); Dalrymple v. Sinkoe, 230 N. C. 453, 53 S. E. 2d 437 (1949); Caudle v. F. M. Bohannon Tobacco Co., 220 N. C. 105, 16 S. E. 2d 680 (1941); Corum v. R. J. Reynolds Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933); Cashwell v. Fayetteville Pepsi Cola Bottling Works, 174 N. C. 324, 93 S. E. 901 (1917).

<sup>10</sup> American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 34 S. E. 2d 190 (1945); Hill v. Snider, 217 N. C. 437, 8 S. E. 2d 202 (1940); Cleary v. John M. Maris Co., 173 Misc. 954, 19 N. Y. S. 2d 38 (1940); Drake v. Herrman, 261 N. Y. 414, 185 N. E. 685 (1933); Corley Co. v. Griggs, 192 N. C. 171, 134 S. E. 406 (1926); Flynn v. Bedell Co., 242 Mass. 450, 136 N. E. 252 (1922).

cover for breach of warranty if the injury results from his own hypersensitive or allergic condition and this condition is unknown to the seller. The inquiry of this note is whether or not there is or should be a distinction drawn between common allergies and those that are rare.

Several cases have discussed the ratios of allergic to non-allergic persons with respect to various products,<sup>11</sup> but none have based their holdings on the ratio. Those courts denying recovery have simply said there is no warranty of fitness to allergic persons;<sup>12</sup> and those allowing recovery have made the seller liable for injuries to the hypersensitive as well as the normal person.<sup>13</sup>

The rationale for refusing to extend the warranty to idiosyncratic persons is that a seller is not bound to anticipate injury to the small group injured. This reasoning would be valid in actions based on negligence because of the requirement of foreseeability; but warranty, even though closely allied with tort,<sup>14</sup> should not be based on prevision of harm. Negligence should not be the test in an action for breach of warranty.

An interesting case arising in Massachusetts, *Bianchi v. Denholm McKay Co.*,<sup>15</sup> held that if the product was known to be injurious to "some" persons, even though admittedly in a "non-average" class because of their peculiar sensitivity or allergy, the seller could not be heard to say the warranty did not extend to them. This class of "non-average" persons was not designated by numbers or percentage. The *Bianchi* case has struck a medium between the two extremes mentioned above but the liability of the seller is based on scienter in that the seller must know the product is injurious to a class of persons. There are probably many substances that will produce adverse reactions in a comparatively

<sup>11</sup> *Zirpola v. Adam Hat Stores, Inc.*, 122 N. J. L. 21, 4 A. 2d 73 (1939) (4 or 5 in 100); *Hesse v. Travelers' Ins. Co.*, 299 Pa. 125, 149 Atl. 96 (1930) (1 in 1,000,000); *Antowill v. Friedmann*, 197 App. Div. 230, 188 N. Y. Supp. 777 (1921) (1 in 200, or 300); *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N. W. 48 (1913) (1 in 100).

<sup>12</sup> *Longo v. Touraine Stores, Inc.*, 319 Mass. 727, 66 N. E. 2d 792 (1946); *Stanton v. Sears Roebuck & Co.*, 312 Ill. App. 496, 38 N. E. 2d 801 (1942); *Zager v. F. W. Woolworth Co.*, 30 Cal. App. 2d 324, 86 P. 2d 389 (1939); *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 A. 2d 650 (1939). Of course where there is a toxic chemical, or the product is adulterated, the warranty will extend. *Rogiers v. Gilchrist Co.*, 312 Mass. 544, 45 N. E. 2d 744 (1942) (toxic chemical); *Sapiente v. Waltuch*, 127 Conn. 224, 15 A. 2d 417 (1940) (food infested with bugs); *Pietrus v. Watkins Co.*, 229 Minn. 179, 38 N. W. 2d 799 (1949) (excessive amount of alkali); *Smith v. Burdine's Inc.*, 144 Fla. 500, 198 So. 223 (1940) (poison in lipstick).

<sup>13</sup> *Reynolds v. Sun Ray Drug Co.*, 135 N. J. L. 475, 52 A. 2d 666 (1947); *Kurriess v. Conrad & Co.*, 312 Mass. 670, 46 N. E. 2d 12 (1942) (Here although there was evidence that contact dermatitis was classified in the "allergy" group of disturbances, the recovery by the buyer was allowed even though the court did not refer to any showing that the dye contained any poisonous substances); *Zirpola v. Adam Hat Stores, Inc.*, 122 N. J. L. 21, 4 A. 2d 73 (1939).

<sup>14</sup> 1 WILLISTON, SALES § 195 (rev. ed. 1948).

<sup>15</sup> 302 Mass. 469, 19 N. E. 2d 697 (1939).

large class of sensitive persons,<sup>16</sup> and yet the seller is likely to have no knowledge of this and, under the holding of the *Bianchi* case, will not be liable. An earlier case in Massachusetts, *Flynn v. Bedell*,<sup>17</sup> flatly refused recovery to the plaintiff on the ground that the idiosyncrasy was "wholly unknown" to the seller. The words in the principal case are in part identical with those used by the Massachusetts court in the *Flynn* case.<sup>18</sup> It remains to be seen whether our court will follow the *Bianchi* case if a set of facts arises whereby the seller knows the product will produce inflammation in those with hypersensitive skins. Sometimes a "spot patch" test can be used to determine one's susceptibility to certain products, and dealers usually give directions for such a test if there is a known irritant in the product.<sup>19</sup> For goods taken internally, however, there can, of course, be no spot test.

The principal case is one of first impression in North Carolina and the court went along with the majority view in saying breach of warranty does not extend to persons having allergies. The court, citing *Ross v. Porteous, Mitchell & Braun Co.*<sup>20</sup> said, "It would seem that the cause of plaintiff's dermatitis remains a matter of doubt and conjecture."<sup>21</sup> The *Ross* case denied recovery on the ground that by the evidence presented it was conjectural whether the plaintiff had an allergy, in which case there would be no recovery, or whether the product was adulterated; and that the court would not deal with conjecture nor attempt to guess the cause of the injury. The language of the principal case is that if the buyer has an allergy he cannot recover; yet, as pointed out earlier, the court stated the qualification that the allergy of the buyer must be wholly unknown to the seller.<sup>22</sup> A negative inference from this would seem to be that if the seller *knew* of the possible ill effect on the buyer, *i.e.*, knew of any buyer who was allergic to the product, the seller would be liable on his warranty. It is hoped the court did intend to place this qualification on the decision in the principal case. It is also submitted that if the allergy to the product is of the more common type the seller should be liable on his warranty even though the seller has no actual knowledge of the product's possible ill

<sup>16</sup> *Zirpola v. Adam Hat Stores, Inc.*, 122 N. J. L. 21, 4 A. 2d 73 (1939) (hat dyes); *Drake v. Herrman*, 261 N. Y. 414, 185 N. E. 685 (1933) (hair dyes); *Flynn v. Bedell Co.*, 242 Mass. 450, 136 N. E. 252 (1922) (fur dyes); *Antowill v. Friedmann*, 197 App. Div. 230, 188 N. Y. Supp. 777 (1921) (x-rays).

<sup>17</sup> 242 Mass. 450, 136 N. E. 252 (1922).

<sup>18</sup> Compare "an implied warranty of fitness does not extend to fitness in respect to matters wholly unknown to the dealer and peculiar to the individual buyer," with the North Carolina Court's language above.

<sup>19</sup> N. C. GEN. STAT. § 106-136 (1939) is a statutory example which provides that if the seller properly labels his product as to the injurious substance it will not be deemed adulterated.

<sup>20</sup> 136 Me. 118, 3 A. 2d 650 (1939).

<sup>21</sup> *Hanrahan v. Walgreen Co.*, 243 N. C. 268, 269, 90 S. E. 2d 392, 393 (1955).

<sup>22</sup> *Ibid.*

effects on the sensitive buyer. Of course if the allergy is to common and well known substances such as strawberries, tomatoes, and pollen, a different legal consequence should naturally follow. In such cases the buyer can be expected to avoid the common substances to which he is allergic.

HAMLIN WADE.

### Trade Regulations—Section 7 of the Clayton Act

Section 7 of the Clayton Act as originally passed in 1914 read, in part:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."<sup>1</sup>

The original Section 7 was passed to supplement the Sherman Act<sup>2</sup> by forestalling restraints of trade and monopolization at an earlier stage than did that act. By judicial interpretation, an actual showing of conspiracy,<sup>3</sup> monopolization,<sup>4</sup> predatory practices,<sup>5</sup> or an intent to restrain trade<sup>6</sup> was held necessary in order to invoke the restraints of the Sherman Act. By the time this evidence was available to the government, the merger involved had already taken place, and the government then faced the difficult task of breaking up a corporation already integrated into one operating unit. The original Section 7 of the Clayton Act was intended "to arrest the creation of trusts, conspiracies, and monopolies in their incipency and before consummation."<sup>7</sup> Since the most prevalent method of corporate merger at that time was the acquisition of the *stock* of one corporation by another, the original act was aimed at such acquisitions. By judicial interpretation,<sup>8</sup> mergers were held not to be within the purview of the statute if the acquiring corpora-

<sup>1</sup> 38 STAT. 730 (1914), 15 U. S. C. § 18 (1914).

<sup>2</sup> 26 STAT. 209 (1890), 15 U. S. C. §§ 1-7 (1951).

<sup>3</sup> *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

<sup>4</sup> *United States v. Aluminum Co. of America*, 149 F. 2d 416 (2d Cir. 1945).

<sup>5</sup> *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948).

<sup>6</sup> *Great Atlantic and Pacific Tea Co. v. United States*, 227 Fed. 46 (2d Cir. 1915).

<sup>7</sup> H. R. Rep. No. 698, 63d Cong., 2d Sess. 6553 (1914).

<sup>8</sup> *Swift and Co. v. Federal Trade Commission*, 272 U. S. 554 (1926). *A* Company acquired the stock of *B* Company. The government brought suit under the old Section 7. Prior to judgment *A* Company used the stock to acquire the assets of *B* Company. The court held that the acquisition of the assets was a legal transaction and that *A* Company could be required to divest itself only of the now worthless stock. This became known as the "jurisdictional loophole" and relegated old Section 7 to insignificance.